United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1015

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1015

UNITED STATES OF AMERICA,

APPELLEE,

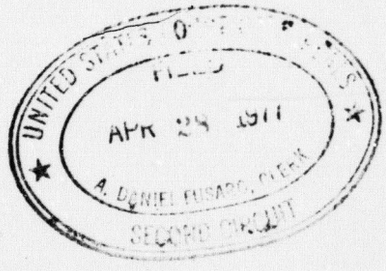
-vs-

JAMES APUZZO,

APPELLANT.

On Appeal From The United States District Court
For The District of Connecticut

APPELLANT'S REPLY



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1. Appellant's misdemeanor conviction for possession and transportation of untaxed cigarettes was not admissible under Evidence Rule 609(a)(2) to impeach his credibility.

The government's brief argues that the appellant's prior conviction for possession and transportation of untaxed cigarettes was properly admitted to impeach his credibility as a witness. In support of this argument, the government contends it finds confusion in the legislative history where in fact

there is none, relies on obsolete caselaw, and disregards the weight of recent authority construing Fed. R. Evid. 609(a)(2).

The Congressional remarks cited by the government (G.Br. 11-14) come from the House floor debate in early February, 1974. The committee report accompanying the bill before the House did not define the phrase "dishonesty or false statement," and considerable dispute arose as to its intended meaning. H.Rep. 93-650, 93d Cong., 2d Sess. (Nov. 15, 1973), reprinted in Federal Rules of Evidence 61-62 (Fed. Jud. Center ed., West 1975)("West's Rules Pamphlet"). When the issue was later referred to the Senate, however, the Judiciary Committee issued a report answering the Congressmen's questions and offering the limiting definition, S. Rep. 93-1277, 93d Cong., 2d Sess. (Oct. 11, 1974), reprinted in West's Rules Pamphlet 62-63, later adopted by the Conference and agreed to by both houses. Conf. Rep. 93-1597 (Dec. 14, 1974), reprinted in West's Rules Pamphlet 63:

> By the phrase 'dishonesty and [sic] false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The purpose and effect of the Senate and Conference reports was to resolve the meaning of Rule 609(a)(2). The uncertainty which the government seeks to create in this simple rule is just not there.

The overwhelming weight of judicial authority applying Rule 609(a)(2) supports the appellant's position. Thoughtful discussions of the historical meaning of crimen falsi, all supporting the narrow definition appellant urges, may be found in United States v. Smith (Gartrell), Nos. 75-1920 & 1941 (D.C. Cir., Dec. 17, 1976), slip op. at 28-35; United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976); Government of Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976); Government of Virgin Islands v. Testamark, 528 F.2d 742 (3d Cir. 1976); United States v. Brashier, 548 F.2d 1315, 1326 (9th Cir. 1976); United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976)(impeachment of witness); United States v. Ortiz, No. 76-1460 (2d Cir., April 11, 1977), slip op. 2789, 2795-2800 (Mansfield, J., dissenting).[1/] For example, in Millings, the Court explained:

> An intent to deceive or defraud is not an element of either [possession of narcotics or carrying a pistol without a license] .... Certainly we cannot say that either offense, in the language of the Conference Committee, is 'peculiarly probative of credibility.' Although it may be argued that any willful violation of law ... evinces a lack of character and a disregard for all legal duties, including the obligations of an oath, Congress has not accepted that expansive theory.

1/ The majority in Ortiz did not dispute Judge Mansfield's analysis of Rule 609(a)(2), but rather seemed to rest its decision on 609(a)(1). In opposition to the above authorities, United States v. Carden, 529 F.2d 443, 446 (5th Cir.), cert. denied, 97 S.Ct. 134 (1976), stands alone. That ruling, given without benefit of argument (Gartrell, supra, at 33), contains no analysis whatever, only a conclusion.

535 F.2d at 123. This Court should align itself with the D.C., Third and Ninth Circuits in rejecting efforts to undermine the Congressional mandate of Rule 609(a)(2).[2/]

2. The error in admission of the appellant's prior conviction was not harmless.

By glossing over the nature of the instant charge ("firearms offense," G.Br. 17 n.15), the government ignores the prejudicial similarity between dealing in firearms without obtaining the required license and transporting cigarettes without paying the required tax. Each, at its root, involves indulging in a regulated business without paying for and obtaining governmental authority.

Moreover, the government's reliance on United States v. Zubkoff, 416 F.2d 141, 144 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970), is misplaced for the same reason discussed in Part 1 above--namely, the intervening passage of the Federal Rules of Evidence. Zubkoff relied for its standard of "harmless error" on Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)(footnote omitted):

> If, when all is said and done, the conviction [sic] is sure that the error did not influence the jury, or had but very slight effect, the verdict

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2/ With respect to the government's reliance on United States v. DeAngelis, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974), this Court should adopt the Gartrell court's declaration that reliance on pre-Rule cases decided under the Luck-Gordon (Palumbo) test is now "misplaced." Slip op. at 28.

> and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.

(Emphasis added.) Unlike the situation prevailing at the time this Court decided Zubkoff, there is now a "specific command of Congress" applicable to this issue. The Supreme Court answered the first half of the question left open in Kotteakos in Chapman v. California, 386 U.S. 18 (1967), holding that Constitutional error is not harmless unless the court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24. This Court should now make explicit what was implicit in the language of Kotteakos equating Constitutional errors with violations of specific Congressional commands: such errors should be evaluated by the same, higher standard, the "harmless beyond a reasonable doubt" test of Chapman.

Under the Chapman test, the appellant's conviction cannot stand. Moreover, for the reasons stated in the principal brief, the error cannot even be called harmless under the Zubkoff test. Toto, supra, 529 F.2d at 283-85; Gartrell, supra, at 36-38. On the crucial issue of predisposition, the case was essentially the appellant's word against that of a paid informant. Inadmissible evidence going to the appellant's credibility thus cannot be called harmless.

CONCLUSION

For all the foregoing reasons, and for those presented in the appellant's opening brief, the judgment of conviction should be reversed.

Respectfully submitted,

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Dated: April 27, 1977

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On The Reply:

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CERTIFICATION

I hereby certify that 2 copies of the foregoing Reply have been mailed to Hugh Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 27th day of April, 1977.

Peter Goldberger